NO. 94-1822

SUPREME COURT, U.S.
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In The

Supreme Court of the United States

October Term, 1994

IN RE: STATE OF WEST VIRGINIA
PUBLIC BUILDING ASBESTOS LITIGATION.

On Petition for Writ of Certiorari to the West Virginia Supreme Court of Appeals

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the alleged personal bias or prejudice of the trial judge deprived Petitioners of their constitutional right to due process of law.

2. Whether the Supreme Court will review an issue first raised below on petition for rehearing, where the issue could have earlier been raised, but was not.

3. Whether the opinion below is a "final judgment or decree" within the meaning of 28 U.S.C. § 1257.

LIST OF PARTIES

Petitioners are W.R. Grace & Co. -Conn., Pfizer Inc. and Asbestospray Corporation who are appellants below.

Respondents are the State of West Virginia, City of Spencer, West Virginia and the Monroe County Commission, Monroe County, West Virginia who were appellees below.

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APPENDIX

Appendix A — West Virginia Code 1966 Chapter 50, Appeal and Error, Article 5, Appellate Relief in Supreme Court of Appeals 1a

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To The Honorable Supreme Court:

The Respondents, State of West Virginia, City of Spencer, West Virginia, and Monroe County Commission, Monroe County, West Virginia respectfully request that this Court deny the Petition for Writ of Certiorari submitted by Petitioners, W.R. Grace & Co. -Conn., Asbestospray Corporation and Pfizer, Inc.

OPINIONS BELOW

The order of the Circuit Court of Monongalia County, West Virginia granting Respondents' motion for a new trial is unpublished; however, the order is reproduced in the appendix to the Petition for Certiorari (App. B, 31a-34a).

On December 21, 1994, the West Virginia Supreme Court of Appeals affirmed the trial court's order granting a new trial, but reversed the trial court's order with respect to the statute of limitations, and remanded for further proceedings regarding the trial court's determination that Petitioners' products were defective as a matter of law. The court's opinion is reported at 454 S.E. 2d 413 (W. Va. 1994) and appears as Appendix A to the Petition for Writ of Certiorari.

On February 2, 1995, the West Virginia Supreme Court of Appeals denied the Petitioners' joint petition for rehearing filed by W.R. Grace & Co.-Conn. and joined by Asbestospray Corporation and Pfizer Inc. The court's order denying the joint petition is unreported; but it is reproduced in the appendix to the Petition for Writ of Certiorari (App. D, 36a).

On March 13, 1995, the Acting Chief Justice of the West Virginia Supreme Court of Appeals, acting in an administrative capacity, denied Petitioner W.R. Grace & Co.-Conn.'s motion to prospectively disqualify the Honorable Larry V. Starcher from

presiding over the anticipated new trial. The administrative order denying disqualification is unreported; but it appears as Appendix C to the Petition for Writ of Certiorari (App. C, 35a).

STATEMENT OF JURISDICTION

Petitioners purport to invoke this Court's jurisdiction under 28 U.S.C. § 1257(a). However the question presented to this Court was neither properly presented to nor decided by the court below, nor is the opinion sought to be reviewed a final judgment or decree.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In addition to those constitutional and statutory provisions cited by the Petitioner, Respondents submit the following to this Court:

> West Virginia Code § 58-5-1 (reproduced as Respondent's Appendix A).
>
> Rule XVII, trial court rules for trial courts of record of the State of West Virginia (reproduced as Respondents' Appendix B).

STATEMENT OF THE CASE

The question presented to this Court could have been, but was not properly presented to the court below.

This is an asbestos property damage case in which the trial court, at the close of all the evidence, instructed the jury that Petitioner's asbestos-containing building materials are defective as a matter of law under West Virginia's law of product liability.

Because of statements made at the close of Petitioners' case regarding the product defect issue, W.R. Grace & Co. and Pfizer, Inc., (but not Asbestospray Corporation) moved the trial judge to disqualify himself. The trial court denied that motion.

Because the trial judge instructed the jury that Petitioners' products are defective, "[t]his left for the jury the issue of whether the plaintiffs proved that the respective defendants had such products in the building at issue, and if so, the damages resulting from their presence." (App. B, 32a).

Notwithstanding the foregoing instruction, the jury awarded "0" damages against each of the Petitioners. The trial court granted Respondents' motion for a new trial on product identification and damages because "the existence of Defendants' products was admitted to be in several of the Plaintiffs' buildings by more than one of the Defendants," and because "[t]here was also an abundance of evidence on the cost of maintenance, removal, and/or repair relating to the products [in those buildings]." (App. B, 32a-33a).

In their Joint Petition for appellate review of the trial court's order granting a new trial,[1] Petitioners argued that the jury verdict should be reinstated on the basis of the record and instructions below, including the instruction with respect to product defect. (Joint Brief for Appellants, p. 6). Petitioners sought review of the product defect instruction only if the West Virginia Supreme Court of Appeals affirmed the order granting a new trial. In that event, Petitioners urged the court to "[r]everse the ruling that,

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1. The appellate jurisdiction of the West Virginia Supreme Court of Appeals is not limited to final judgments. Unlike the jurisdictional statutes of many state courts, West Virginia Code § 58-5-1 specifically provides: "In any civil case where there is an order granting a new trial or rehearing, an appeal may be taken from the order without waiting for the new trial or rehearing to be had." (Resp. App. A).

notwithstanding a wealth of evidence to the contrary, 'all' ACM's are 'inherently dangerous and therefor "defective" as a matter of law.' " (Joint Brief of Appellants, p. 7).

The Supreme Court of Appeals affirmed the order granting a new trial, subject to its instruction that, ". . . if the trial judge makes the same decision on remand with regard to the products being defective as a matter of law, then the trial judge must clearly indicate on the record how he came to that conclusion." (App. A, 18a-19a).

Petitioners also assigned as error the trial court's refusal to recuse himself, but Petitioners carefully limited the relief sought to a request that the court direct recusal only with respect to any new trial awarded. (Joint Brief of Appellee, p. 43).[2] The West Virginia Supreme Court of Appeals properly noted that the issue of whether the trial judge should be recused from hearing the new trial ". . . is more appropriately disposed of pursuant to Rule XVII of the *West Virginia Trial Court Rules for Trial of Record* (Rule XVII outlines the proper procedure for disqualifying a judge.)" (App. A, 21a).

Only W.R. Grace & Co. thereafter elected to seek to disqualify the trial judge from hearing the new trial under Rule XVII, basing its motion on the statements that were made by the trial judge when expressing his opinion that Petitioners' products are defective as a matter of law. When the trial judge declined to voluntarily recuse himself, Grace's disqualification motion was submitted to the Acting Chief Justice of the West Virginia Supreme Court of Appeals, who, acting in an administrative (non-judicial) capacity, pursuant to Rule XVII, denied the motion because the trial court's statements were "facially insufficient" to

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2. Petitioner did *not* seek to vacate the order granting a new trial, on this ground, until their petition for rehearing.

warrant disqualification (App. D, 35a). W.R. Grace & Co. did not seek judicial review of this decision by writ of prohibition or other extraordinary writ as contemplated by Rule XVII(f). (Resp. App. B, 3a).[3]

SUMMARY OF THE ARGUMENT

1. Petitioners' allegations of personal bias or prejudice on the part of the trial judge do not implicate constitutional due process of law.

2. Petitioners failed to timely raise below the issues presented to this Court.

3. This Court has no jurisdiction under 28 U.S.C. § 1257 because the orders below are not "final judgments or decrees".

REASONS FOR DENYING THE WRIT

I.

PETITIONERS' ALLEGATIONS OF PERSONAL BIAS OR PREJUDICE DO NOT IMPLICATE CONSTITUTIONAL DUE PROCESS.

This Court has instructed that not all questions of judicial qualification implicate the due process clause. "[M]atters of kinship, personal bias, state policy, remoteness of interest, would seem generally to be matters merely of legislative discretion." *Tumey v. Ohio*, 273 U.S. 510, 523 (1927). *See also, FTC v. Cement Institute*, 333 U.S. 683, 702 (1948) ("[M]ost matters

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3. The Petition incorrectly states that W.R. Grace's motion to recuse the judge from hearing the new trial was presented to the West Virginia Supreme Court of Appeals. (Petition, p. 7).

relating to judicial disqualification [do] not rise to a constitutional level").

The due process clause can be implicated in cases involving judicial self-interest. But this is not a situation in which a trial judge sat in judgment of his own case. *In re Murchison,* 349 U.S. 133, 136 (1955). Nor have Petitioners shown that the trial judge is or was motivated by a self-interest that is "direct, personal, substantial, [and] pecuniary." *Ward v. Village of Monroeville,* 409 U.S. 57, 60 (1972); quoting *Tumey v. Ohio, supra.* Indeed, Petitioners make no claim that the trial judge had any personal interest whatsoever in the outcome of this case. Rather, they claim that, under state law, the trial court may not rely on prior rulings to dispose of issues arising at trial.

Regardless of whether Petitioners' allegations of "personal bias" or "prejudice" warranted disqualification as a matter of state policy,[4] they do not involve the kind of judicial self-interest that this Court has recognized as implicating a litigant's constitutional right to due process of law. *See Aetna Life Ins. Co. v. Lavoie,* 475 U.S. 813, 820-23 (1986).

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4. Respondents do not concede that recusal was or is warranted in this case. This Court has adopted the "extrajudicial source" doctrine (or factor) when analyzing whether a federal trial judge's personal bias warrants recusal under 28 U.S.C. § 144 or 455(a). *Liteky v. United States,* 114 S. Ct. 1147 (1994). Under this standard Judge Starchers alleged "bias" would not have warranted recusal because "[o]pinions formed by the judge on the basis of facts introduced or events occurring in the course of the *current proceedings, or of prior proceedings,* do not constitute a basis for a bias or partiality motion unless they display a deep seated favoritism or antagonism that make fair judgment impossible." *Id.* at 1157 (emphasis added).

II.

PETITIONERS FAILED TO RAISE BELOW THE ISSUE PRESENTED TO THIS COURT.

Petitioners contend that, because the trial judge was charged with personal bias, the West Virginia procedure authorizing him to grant a new trial based on his evaluation of the evidence offends traditional notions of fairness that are incorporated in the due process clause. This constitutional challenge to the procedure for granting new trials was not properly presented to either the trial or appellate court below.

W.R. Grace & Co. and Pfizer Inc., requested recusal during the trial, but their request was based on the ground that the trial judge had pre-judged the product defect issue — an issue which was *not* submitted to the jury. When Respondents moved for a new trial on the issues that *were* submitted to the jury (product identification and damages), none of the Petitioners asked the trial judge to recuse himself from considering that motion. And after the trial court granted a new trial as to product identification and damages, none of the Petitioners asked the West Virginia Supreme Court of Appeals to vacate the new trial order based on the trial judge's alleged bias, but rather sought review thereof only on its merits.

Petitioners' request that the Supreme Court of Appeals review the trial judge's refusal to recuse himself was expressly limited to a recusal only in connection with the new trial.[5] The reason why Petitioners did not challenge the new trial order itself on this ground is obvious. If the trial court should have recused

5. "In the event this Court does not reinstate the verdict in its entirety, Judge Starcher should not participate in any further proceedings, his pretrial and trial rulings should be vacated and any new trial should be on all liability issues." (Joint Brief of Appellants, p. 43).

itself during trial, the remedy would be a new trial before a different judge, *not* reinstatement of the verdict.

Petitioners' constitutional challenge to the trial judge's qualification to hear the new trial motion was not raised until after the Supreme Court of Appeals had reviewed the new trial order and found no abuse of discretion. This tactic smacks of seeking "two bites at the apple." The due process clause does not afford Petitioners the right to await the outcome of their appeal on the merits before questioning the constitutionality of permitting the trial judge to participate in the process.[6] *American Surety Co. v. Baldwin*, 287 U.S. 156, 163-164 (1932).

III.

THIS COURT HAS NO JURISDICTION UNDER 28 U.S.C. § 1257 BECAUSE THE ORDERS BELOW ARE NOT "FINAL JUDGMENTS OR DECREES."

The cases in which this Court has measured state judicial qualifications against the requirements of constitutional due process did not reach this Court until a final judgment had been rendered by the state's highest court. *See, e.g., Aetna Life Ins. Co. v. Lavoie, supra.* Petitioners seek review of an order granting a new trial. Orders granting new trials (including those based on the weight of the evidence) are not final judgments or decrees within the meaning of 28 U.S.C. § 1257.

West Virginia's policy of permitting interlocutory appeals from orders granting new trials does not make them "final." "[I]t

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6. Petitioners argue that the lower court in this case formulated a new standard for granting new trials justifying their waiting until rehearing to raise their current due process claim; but their argument attributes to a *per curiam* decision authority that is not recognized in West Virginia (*see* App. A, 11a, n. 3). It is clear from the lower court's decision that it did not perceive itself as applying a new rule of state law.

frequently has been said that for a judgment of an appellate court to be final and reviewable for this purpose it must end the litigation by fully determining the rights of the parties, so that nothing remains to be done by the trial court 'except the ministerial act of entering the judgment which the appellate court . . . directed.' (citation omitted) Thus, where the effect of the state court's direction is to grant a new trial, the judgment will not be final." *Gospel Army v. City of Los Angeles,* 331 U.S. 543, 546 (1946).

Nor is the acting Chief Justice's subsequent denial of W.R. Grace's motion to disqualify a "final judgment or decree." Under West Virginia's diaqualification rule, orders regarding disqualification are interlocutory in nature and not subject to direct or immediate appeal except by extraordinary writ, a remedy Petitioners have not yet invoked. Rule XVII(f), *Trial Court Rules for Trial Courts of Record.* (Resp. App. B, 3a)." Such orders can, however, be effectively appealed after final judgment is entered.[7]

Petitioners' reliance on *Cox Broadcasting Corp. v. Cohen,* 420 U.S. 469 (1975) is misplaced. In *Cox Broadcasting,* the Georgia Supreme Court upheld the constitutionality of a Georgia statute prohibiting the broadcasting of names of rape victims, but remanded the case for further proceedings regarding plaintiff's

7. Likewise, a federal judge's refusal to disqualify his/herself upon the filing of an affidavit of bias or prejudice pursuant to 28 U.S.C. § 144 is not a "final decision" within the meaning of 28 U.S.C. § 1291. *In re City of Detroit,* 828 F.2d 1160, 1165-67 (6th Cir. 1987); *In re Corrugated Container Antitrust Litigation,* 614 F.2d 958, 960-961 (5th Cir.), *cert. denied,* 449 U.S. 888 (1980); *United States v. Washington,* 573 F.2d 1121, 1122 (9th Cir. 1978); *Vuono v. United States,* 441 F.2d 271, 272 (4th Cir. 1971); *Robinson v. Largent,* 419 F.2d 1327 (3d Cir. 1970). And since the denial of recusal can be effectively appealed after final judgment, it is not a "collateral order" under the doctrine of *Cohen v. Beneficial Industrial Loan Corp.,* 337 U.S. 541 (1949). *See, e.g., In Re Corrugated Container Antitrust Litigation, supra.*

civil damages claim for invasion of privacy. Left unreviewed, the decision upholding the Georgia statute threatened to broadly restrict the exercise of important First Amendment rights. *Id.* at 485-486. An unreviewed state court decision regarding a trial judge's qualifications to hear a specific case poses no comparable threat. Only the parties to the litigation will be affected and their concerns may be mooted by the outcome of the new trial. No broad federal policy will be served by departing from the finality requirement of 28 U.S.C. § 1257 in order to police state court judicial qualifications prior to final disposition by the state courts themselves.

Immediate review by this Court would obviate the necessity of a new trial should petitioners prevail on the purported federal issue. However, this perceived utility is fully offset by the corresponding waste of this Court's efforts should the federal issue be mooted by Petitioners' success in the state court proceedings to follow. In either event, time and resources will be expended to resolve issues that might have been mooted had the other course been chosen.

CONCLUSION

The Respondents pray that this Court deny the Petition for Writ of Certiorari because this case presents no issue appropriate for the Court's review.

Respectfully submitted,

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APPENDIX A — WEST VIRGINIA CODE 1966 CHAPTER 50, APPEAL AND ERROR, ARTICLE 5, APPELLATE RELIEF IN SUPREME COURT OF APPEALS

WEST VIRGINIA CODE 1966 CHAPTER 50, APPEAL AND ERROR, ARTICLE 5, APPELLATE RELIEF IN SUPREME COURT OF APPEALS

§ 58-5-1 When appeal or writ of error lies.

A party to a controversy in any circuit court may obtain from the Supreme Court of Appeals, or a judge thereof in vacation, an appeal from, or a writ of error or supersedeas to, a judgment, decree or order of such circuit court in the following cases:

(a) In civil cases where the matter in controversy, exclusive of costs, is of greater value or amount than one hundred dollars, wherein there is a final judgment, decree or order;

* * *

(i) In any civil case where there is an order granting a new trial or rehearing, and in such cases an appeal may be taken from the order without waiting for the new trial or rehearing to be had;

Appendix A

* * *

Appeals shall not lie under subdivisions (g), (h) and (i) where pecuniary interests only are involved, unless the amount in controversy, exclusive of costs, exceeds one hundred dollars.

APPENDIX B — WEST VIRGINIA TRIAL COURT RULES FOR TRIAL COURTS OF RECORD

WEST VIRGINIA TRIAL COURT RULES FOR TRIAL COURTS OF RECORD

Rule XVII. Disqualification and Temporary Assignment of Judges.

(a) *Disqualification.* In any proceeding, except an injunction or a summary contempt proceeding, any party may file a written motion for disqualification of a judge. The motion shall be verified, shall state the facts and reasons for disqualification, and shall be accompanied by a certificate of counsel of record or unrepresented party stating it is made in good faith and has evidence sufficient to support disqualification. The motion shall be filed with the circuit clerk at least 21 days in advance of any trial date set in the case or at least 7 days in advance of any date set for a non-trial proceeding in the case. At the time of filing, the moving counsel or unrepresented party shall submit directly to the judge a written notice of the motion.

(1) Upon the filing of such motion, a judge who finds good cause and agrees to recuse himself or herself shall ascertain whether concurrence can be reached between parties as to the designation of a different judge, either from within or without the circuit, to hear the proceeding.

Appendix B

* * *

(3) If concurrence cannot be reached, if the original judge does not agree to recuse himself or herself, or if the designated judge does not consent, then the judge shall:

(A) Proceed no further in the matter; and

(B) Transmit forthwith to the Chief Justice a copy of the motion and certificate, a letter stating his or her response to the motion and reasons therefor, and a completed assigned judge request form provided by the Administrative Office, asking that the Chief Justice rule on the motion or, if the information is insufficient, direct that a hearing be held on the matters relating to the disqualification motion. The letter shall include such matters or considerations as the judge may deem relevant.

(i) If the Chief Justice determines that the evidence set out in support of the disqualification motion is insufficient, the Chief Justice shall, within 7 days of receiving the motion, by order either deny the motion and direct the judge

to proceed with the case or direct the judge to hold a hearing to allow the moving party to make a full record, for the purpose of review if the case is appealed upon final judgment, and then to proceed with the case.

(ii) If the Chief Justice determines that the evidence set out in support of the disqualification motion is sufficient, the Chief Justice shall within 7 days of receiving the motion direct the judge in writing not to proceed with the case and, within 14 days thereof, shall by order assign a different judge to hear the case.

(iii) If the Chief Justice determines that the matters relating to the disqualification motion raise issues sufficient to warrant a hearing before a different judge, the Chief Justice shall, within 14 days of receiving the motion, by order assign a judge from without the circuit to hear the disqualification matters as provided by subdivisions (c)(2) and (3) below.

(4) In the event a disqualification motion is filed with the circuit clerk and written notice thereof is submitted to the judge less than 21 days in advance of the date set for trial or less than 7 days in advance of the date set for a non-trial proceeding, or in the

event the matter is an injunction proceeding or a proceeding for summary contempt, the involved judge shall within 7 days hold a hearing on the motion for disqualification, shall allow the moving party to make a full record, and shall then rule forthwith on the motion for disqualification.

> (A) If the judge denies the motion for disqualification, he or she shall proceed with the case.
>
> (B) If the judge grants the motion, he or she shall proceed no further in the matter and shall:
>
> > (i) Forthwith transmit the motion and reason for the ruling to the Chief Justice, who shall, within 7 days of receipt, by order assign a different judge; or
> >
> > (ii) Proceed pursuant to Subdivisions (1) and (2) or (3) above.

* * *

(f) *Challenge to disqualification rulings.* All rulings and order relating to the recusal or disqualification of a judge shall be considered interlocutory in nature and not subject to direct or immediate appeal. This rule shall not, however, prohibit any party from seeking or using redress available by writ of prohibition or any other appropriate extraordinary writ.

* * *